



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Arb. Case No. 40/2009

Reserved on: 23.8.2013

Decided on: 24.9.2013

Jai Inder Pal Singh

....Petitioner

Versus

Jasvinder Singh Narula

....Respondent

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

*Whether approved for reporting?*¹

For the petitioner: Mr. J.S.Bhogal, Senior Advocate, with
Mr. T.S. Bhogal, Advocate.

For the respondent: M/s Ajay Mohan Goel and Sunil
Mohan Goel, Advocate.

Rajiv Sharma, Judge:

The petitioner has filed objections under Section 34 of the Arbitration and Conciliation Act, 1996 against the Award dated 16.2.2009 passed by the sole Arbitrator.

2. "Key facts" necessary for adjudication for this petition are that the memorandum of understanding was entered into between the petitioner/non-claimant (hereinafter referred to as the "non-claimant") and the respondent/claimant (hereinafter referred to as the "claimant") in the month of May 1992. Thereafter, first deed of partnership was duly executed to establish a partnership firm under the name & style of M/s Sanjeevan Hospital on 1.12.1992. A partnership agreement (supplementary) was entered into between the partners spelling

¹ *Whether the reporters of the local papers may be allowed to see the judgment?*



out the contributions between the partners and allocation of their respective duties on 14th December 1992. On 23rd August 1993, another deed of partnership (supplementary) was executed between the parties. A lease deed dated 20.1.1994 was executed by Jaimal Singh Namdhari, father of the non-claimant. New partners, namely, Dr. Jandeep Banga and Dr. Sandeep Banga, were introduced on 1.4.1994. A certificate of registration of partnership firm, M/s Sanjeevan Hospital was issued on 29.3.1995. On 21.3.1998, a family settlement deed was executed and registered by Jaimal Singh, father of the non-claimant. According to the settlement, he transferred his $\frac{1}{2}$ in the land and building in favour of the non-claimant, $\frac{1}{4}$ th share in favour of Dr. Jandeep Banga and $\frac{1}{4}$ th share in favour of Dr. Sandeep Banga. On 1st September 1999, Dr. Jandeep Banga voluntarily retired from the partnership. On 24th November 1999, Dr. Jandeep Banga sold his $\frac{1}{4}$ th share in the land and building to the claimant. On 12th January 2000, sale deeds No. 51, 52 and 53 were executed by the Mandi Urban Co-operative Bank Ltd. Mandi, in favour of Dr. Sandeep Banga, claimant and non-claimant in respect of the portion of the land and building, which was rented to the Hospital by the co-owners. Dr. Sandeep Banga retired voluntarily from the partnership business on 10.7.2003. He relinquished part of his share in the immovable property in favour of the non-claimant. The non-claimant on 27th December 2004 had sent a notice of dissolution of the Firm to the claimant. The non-claimant also got published a public notice in Amar Ujala Newspaper



regarding expulsion of the claimant from the partnership business. The correspondence was exchanged between the parties. Since the parties failed to amicably settle the disputes and differences, the claimant issued letter dated 10th May 2005 to the non-claimant for the appointment of the Arbitrator. No reply was sent by the non-claimant. Thereafter, claimant filed an Arbitration Case No.27/05 in this Court, which was decided by the learned Single Judge of this Hon'ble on 1.7.2005. Both the parties filed separate appeals against the order dated 1.7.2005 bearing Arbitration Appeals No. 1 of 2005 and 2 of 2005. These were decided on 18.8.2005. Mr. D.P. Sood, (Retd.) Former Judge of this Court, was appointed as single member of the Arbitral Tribunal. He was ordered to conduct and adjudicate upon the disputes between the parties and passed arbitration Award as soon as possible. The necessary directions were also issued for the interim measures to be taken by the parties during the pendency of the arbitration proceedings. The order dated 1.7.2005 was set aside. The order dated 11.8.2005 passed by this Court in OMP No.388 of 2005 in Arbitration Appeal No.2 of 2005 was ordered to be modified. Mr. Justice D.P. Sood entered into reference. However, later on vide order dated 26.7.2006, Justice D. P. Sood was replaced by Mr. Surinder Sarup (Retd.) Former Judge of this Court as an Arbitrator. He made an Award on 16.2.2009. Hence, these objections.

3. Mr. J.S. Bhogal, learned Senior Advocate, has vehemently argued that ratio of contribution and ratio of the



profit and losses could not be re-determined/re-written by the learned Arbitrator. He has then argued that the impugned Award is beyond the scope of partnership deed. He has further argued that the Award is also against the Public Policy and the learned Arbitrator has misconstrued and misread the evidence placed on record. He has finally contended that the learned Arbitrator has disqualified himself since he was not mentally fit on the date of signing of the Award, i.e. 16.2.2009.

4. Mr. Ajay Mohan Goel, Advocate, has supported the Award dated 16.2.2009.

5. I have heard learned counsel for the parties and also gone through the record carefully.

6. The claimant has filed the claim petition before the learned Arbitrator. Reply was filed to the same by the non-claimant. Rejoinder to the reply was also filed. The claimant has also filed supplementary/amended claim petition, to which reply was filed by the non-claimant. Learned Arbitrator framed issues on 10.12.2005. The parties led their evidence on the basis of the affidavits.

7. The claimant led his evidence by way of filing an affidavit at page 2 of Volume V of the paper book. Pawan Kumar led his evidence by way of filing an affidavit at page 15 of Volume V of the paper book. Jaimal Singh Namdhari, father of the non-claimant led his evidence by way of filing an affidavit at page 30 of Volume V of the paper book. The non-claimant led his evidence by way of filing an affidavit at page 32 of Volume V of the paper book. Sanjeev K. Mehan, Chartered Accountant,



led his evidence by way of filing an affidavit at page 47 of Volume V of the paper book. Mr. L.V. Sharma led his evidence by way of filing an affidavit at page 50 of Volume V of the paper book. Mr. Iqbal Singh Sachdeva led his evidence by way of filing an affidavit at page 51 of Volume V of the paper book. The claimant also led additional evidence by way of an affidavit at page 53 of Volume V of the paper book. The non-claimant filed reply to the same at page 114 of volume V of the paper book.

8. The parties also placed voluminous record including handwritten script of MOU executed between the parties including balance sheets, income tax returns etc..

9. The non-claimant besides challenging the award dated 16.2.2009 on various grounds also assailed the same on the ground that the learned Arbitrator was admitted in PGI Chandigarh w.e.f 16.2.2009 and thus was disqualified. The claimant filed a detailed reply to the same. The non-claimant also filed rejoinder to the same. In the rejoinder, the non-claimant specifically averred that the Arbitrator was admitted in the PGI in the Psychiatric Intensive Care Ward w.e.f. 30.1.2009 to 5.3.2009. The claimant moved an application under Section 9 of the Arbitration and Conciliation Act, 1996 bearing OMP No. 656/2009, for interim directions during the pendency of the arbitration proceedings. The Claimant also moved an application bearing OMP No.673/2009 for placing on record copies of Jamabandi etc.. The non-claimant filed detailed reply to OMP No. 656/2009. The rejoinder was also filed by the claimant to the reply filed by the non-claimant to OMP



No.656/2009. The rejoinder was also filed by the non-claimant to the reply filed by claimant to the main petition. One more application bearing OMP No.311/2010 was also filed under Section 9 of the Arbitration and Conciliation Act by the claimant, to which the reply was filed by the non-claimant. Rejoinder was also filed by the claimant to reply filed by the non-claimant to OMP No. 311/2010. The claimant also moved an application bearing OMP No. 435/2010 for placing on record Annexures PRA and PRB. The non-claimant filed an application bearing OMP No.604/2010 for impleadment of the learned Arbitrator under Order 1 Rule 10 CPC. The reply was filed by the claimant. The non-claimant has also filed an application bearing OMP No. 394/2011 under Order 6 Rule 17 read with Section 151 CPC seeking amendment to the petition. The claimant filed reply to OMP No.394/2011, to which rejoinder was also filed by the non-claimant. The non-claimant withdrew OMP No. 394/2011. The non-claimant again filed an application bearing OMP No. 201/2012 seeking amendment to the petition challenging the impugned Award. The reply was filed by the claimant. Rejoinder was also filed by the non-claimant to the reply filed by the claimant to OMP No.201/2012. The non-claimant also filed an application seeking interim direction bearing OMP No.473/2012 to which reply has been filed by the claimant.

10. Now, the Court will advert to OMP No. 604/2010 preferred by the non-claimant for impleading the Arbitrator as



party and OMP No. 201/2012 preferred by the non-claimant seeking amendment to the petition.

11. The impugned award was made by the learned Arbitrator, as noticed above, on 16.2.2009. The non-claimant has not raised any doubt pertaining to the ill health of the learned Arbitrator during the pendency of the proceedings before him. A very cursory averment has been made in the petition that the learned Arbitrator was admitted in Psychiatry Intensive Care Ward PGI Hospital w.e.f. 30.1.2009 to 5.3.2009. The non-claimant has filed an OMP No. 201/2012 seeking amendment of the petition primarily on the ground that the learned Arbitrator has disqualified himself since he was alleged to have admitted in PGI w.e.f 30.1.2009 to 5.3.2009. Earlier, OMP No. 394/2011 was withdrawn by the non-claimant. The award is dated 16.2.2009 and the same was assailed by the non-claimant by filing petition under Section 34 of the Arbitration and Conciliation Act on 11.5.2009. The first application seeking amendment has been filed bearing OMP No. 394/2011 only on 11th October, 2011. It was withdrawn, as noticed above, and fresh application has been filed bearing OMP No. 201/2012 only on 15.6.2012. It is settled law that the courts ought to be liberal while allowing an application under Order 6 Rule 17 CPC at the same time, strict view has to be taken if the application has been preferred belatedly. There is no explanation why the application has been preferred belatedly. The non-claimant has failed to exercise due diligence while moving the application under Order 6 Rule 17 CPC seeking amendment of the main petition. In case



the application under Order 6 Rule 17 CPC is allowed it will change the entire nature of the proceedings. Filing of the application belatedly is an afterthought. The parties were duly represented by their learned Advocates and they were in best position to see the demeanour and health of the learned Arbitrator.

12. In **State of Maharashtra vs. Hindustan Construction Company Limited**, (2010) 4 SCC 518, their Lordships of Hon'ble Supreme Court have held that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under Section 34(3) of the Act. If incorporation of additional grounds by way of amendment in the application under Section 34 is treated to be tantamount of filing a fresh application in all situations and circumstances, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. Their Lordships have further held that this is not and could not have been the intention of the legislature while enacting Section 34. Their Lordships have held as under:-

"17. Insofar as Code of Civil Procedure, 1908 (for short 'CPC') is concerned, Order VI Rule 17 provides for amendment of pleadings. It says that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as



may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

29. There is no doubt that application for setting aside an arbitral award under Section 34 of 1996 Act has to be made within time prescribed under sub-section(3) i.e., within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamount to filing a fresh application in all situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the Court can be added nor existing ground amended after the prescribed period of limitation has expired although application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of Legislature while enacting Section 34.

30. Moreso, Section 34(2)(b) enables the Court to set aside the arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or the arbitral award is in conflict with the public policy of India. The words in Clause (b) "the Court finds that" do enable the Court, where the application under Section 34 has been made within prescribed time, to grant leave to amend such application if the very peculiar circumstances of the case so warrant and it is so required in the interest of justice.

31. L.J. Leach and Company Ltd. and Pirgonda Hongonda Patil, seem to enshrine clearly that courts would, as a rule, decline to allow amendments, if a fresh claim on the proposed amendments would be barred by limitation on the date of application but that would be a factor for consideration in exercise of the discretion as to whether leave to amend should be granted but that does not affect the power of the court to order it, if that is required in the interest of justice. There is no reason why the same rule should not be applied when the Court is called upon to consider the application for amendment of grounds in the application for setting aside the arbitral award or the



amendment in the grounds of appeal under Section 37 of 1996 Act.

33. Insofar as Bijendra Nath Srivastava is concerned, this Court did not agree with the view of the High Court that the trial court did not act on any wrong principle while allowing the amendments to the objections for setting aside award under 1940 Act. This Court highlighted the distinction between 'material facts' and 'material particulars' and observed that amendments sought related to material facts which could not have been allowed after expiry of limitation. Having held so, this Court even then went into the merits of objection introduced by way of amendment. In our view, a fine distinction between what is permissible amendment and what may be impermissible, in sound exercise of judicial discretion, must be kept in mind. Every amendment in the application for setting aside an arbitral award cannot be taken as fresh application.

36. As noticed above, in the application for setting aside the award, appellant set up only five grounds viz., waiver, acquiescence, delay, laches and res judicata. The grounds sought to be added in the memorandum of arbitration appeal by way of amendment are absolutely new grounds for which there is no foundation in the application for setting aside the award. Obviously, such new grounds containing new material/facts could not have been introduced for the first time in an appeal when admittedly these grounds were not originally raised in the arbitration petition for setting aside the award. Moreover, no prayer was made by the appellant for amendment in the petition under Section 34 before the concerned court or at the appellate stage.

37. As a matter of fact, the learned Single Judge in paragraph 6 of the impugned order has observed that the grounds of appeal which are now sought to be advanced were not originally raised in the arbitration petition and that the amendment that is sought to be effected is not even to the grounds contained in the application under Section 34 but to the memo of appeal. In the circumstances, it cannot be said that discretion exercised by learned Single Judge in refusing to grant leave to



appellant to amend the memorandum of arbitration appeal suffers from any illegality.”

13. In the present case, the award was challenged by filing the present petition on 11.5.2009. The non-claimant belatedly has filed an application bearing OMP No. 394/2011 under Order 6 Rule 17 read with Section 151 CPC seeking amendment to the petition on 11.10.2011, which was withdrawn on 22.5.2012. Subsequently, the non-claimant has filed an application bearing OMP No. 201/2012 seeking amendment to the petition challenging the impugned Award on 15.6.2012. In view of this, no new ground can be permitted to be raised by the non-claimant with regard to the dis-qualification of the learned Arbitrator at a very late stage. The Bar under Section 34(3) is one of the conditions to be taken into consideration while considering the application under Order 6 Rule 17 CPC. The non-claimant has not made out any ground for amendment of the pleadings and for impleadment of the learned Arbitrator. Accordingly, OMP No. 604/2010 and OMP No. 201/2012 are dismissed.

14. Mr. J.S. Bhogal, learned Senior Advocate, has vehemently argued that learned Arbitrator could not re-write/re-determine the ratio of contribution and ratio of the profit and losses. In other words, his submission is that learned Arbitrator has gone beyond the scope of partnership deed entered into between the parties.



15. The MOU was entered into between the parties vide Ext. C1. According to C-1, the contribution of the non-claimant was 3/4th share and was to comprise of his existing total assets in his clinic and health house as on 1.5.1992, including all equipments, drugs, machinery, furniture, fixtures and also the land and building on which the nursing home was to be constructed. The value of these assets, excluding Bank liabilities as on the commencement of the new construction work for the hospital estimated and agreed upon by both the partners, was Rs.30 lac. There was clear understanding, as noticed in Ext. C1, that the land and the previously and additionally constructed Hospital Building in the name of Jaimal Singh would be transferred ultimately to Dr. Jai Inder Pal Singh as his heir. However, for the time being, a rent/lease deed was to be made in favour of Sanjeevan Hospital by Jaimal Singh. The claimant's investment was 1/4th share, i.e. Rs. 10 lacs towards the partnership capital to be paid in installments upto 31st August 1993. However, the amount, if not contributed on the date of commencement of the Hospital, was to carry interest at the rate of 18% per annum upto 31st August 1993. In case Mr. Jasvinder Singh Narula failed to contribute his total capital of Rs.10 Lac by 31st August 1993, the percentage of his share would change proportionately, irrespective of existence of any other document/agreement. -Thereafter, the partnership deed was entered into between the parties on 1.12.1992 and supplementary partnership agreement was entered into between the parties on 14.12.1992. Another partnership deed in



continuation of partnership deed dated 1.12.1992 was entered into between the parties on 23.8.1993. New partners, namely, Dr. Jandeep Banga and Dr. Sandeep Banga were inducted vide partnership deed dated 1.4.1994. The partnership was duly registered on 29.3.1995. On 21.3.1998, family settlement took place whereby Jai Mal Singh, father of the non-claimant had transferred $\frac{1}{2}$ share of his property in the land and building in favour of non-claimant, $\frac{1}{4}$ th share in favour of Dr. Jandeep Banga and $\frac{1}{4}$ th share in favour of Dr. Sandeep Banga. The building was never transferred to the partnership firm even after the family settlement dated 21.3.1998. Dr. Jandeep Banga had voluntarily retired from the partnership on 1.9.1999 and sold his $\frac{1}{4}$ th share in the land building to the claimant on 24.11.1999. Dr. Sandeep Banga had also voluntarily retired from the partnership business on 10.7.2013.

16. The parties led evidence by filing their respective affidavits, as noticed in the opening part of the judgment.

17. The parties have agreed not to cross-examine the witnesses.

18. According to the terms and conditions contained in the partnership deed, the profits of the partnership firm were to be divided as under:-

Non-claimant	75%
Claimant	25%

19. The learned Arbitrator after going through all the documents placed on record and after taking into consideration the affidavits of the witnesses has come to the conclusion that



the non-claimant has only contributed a sum of Rs.2 lac as capital share investment and the claimant has invested Rs.10 lac. The case of the claimant before the learned Arbitrator was that the ratio of the profits would be determined on the basis of the investment made by the partners. The balance sheets w.e.f. 31.12.1992 to 31.12.1993 onwards were placed on record by the parties. However, the claimant in addition to these balance sheets, has also got prepared the balance sheets from Sanjeev K. Mehan, Chartered Accountant, who has led his evidence by filing an affidavit. It will be apt at this stage to reproduce the relevant portion of his statement, which reads as under:-

“a) Opening Capital contribution of Sh. Jai Inder Pal is Rs. 2,00,152.97 and that of Sh. J.S. Narula is Rs.10,00,000/- hence their profit/capital ratio is 16.68 : 83.32 from 1.12.92 to 31.03.94. Sh. Jandeep Banga and Sh. Sandeep Banga joined the firm as partners on 01.04.94, hence forth the new ratio was Sh. Jai Inder Pal 8.34%, Sh. J.S. Narula 83.32, Sh. Jandeep Banga 4.17% and Sh. Sandeep Banga 4.17% (50% of the share of Sh. Jai Inder Pal was transferred to be newly joined partners) upto 31.08.99. Sh. Jandeep Banga retired from the partnership on 31.08.99, 75% of his share was transferred to Sh. Jai Inder Pal and 25% of his share was transferred to Sh. Sandeep Banga hence the new ratio from 01.09.99 upto 10.07.2003 is taken as Sh. Jai Inder Pal 11.12%, Sh. J.S. Narula 83.32% and Sh. Sandeep Banga 5.56%. Sh. Sandeep Banga retired from the partnership on 10.07.2003 and his share of 5.56% was transferred to Sh. Jai Inder Pal, hence forth from 11.07.2003 till 31.03.2004 the new ratio is Sh. Jai Inder Pal 16.68% and Sh. J.S. Narula 83.32%.

b) The annexure C-26 have been divided into two parts i.e. capital account and current account.”

20. According to the affidavit of Sanjeev K. Mehan, the profit ratio between the parties was - Claimant 83.32% and Non-



claimant 16.68%. Mr. Sanjeev K. Mehan in his affidavit has specifically averred that he has prepared Annexure C-26 now Ext. CW1/F on the basis of Annexure C-1, now Ext. CW1/A and other requisite documents including balance sheets as per the share capital (actual and as reflected in balance sheet) contributed by the partners (all four) of the partnership firm. He has prepared the capital and current account of the parties since 1992-93 till 2003-04. The non-claimant has not rebutted the balance sheet prepared by Mr. Sanjeev K. Mehan. The non-claimant has also not produced any balance sheet to rebut the fresh balance sheets prepared by Sanjeev K. Mehan on the basis of share capital and contribution of the partners between the parties. According to Mr. Sanjeev K. Mehan, the opening capital contribution of the non-claimant was Rs. 2,00,152.97 and that of claimant was Rs. 10,00,000/-.

21. Mr. J.S. Bhogal, learned Senior Advocate, has vehemently argued that the learned Arbitrator has not taken into consideration the MOU entered into between the parties, whereby the property was pertaining to assets including all equipments, machinery etc., which were to be transferred to the partnership firm. It has come on record that the land was never transferred to the partnership firm and non-claimant has also raised loan by executing a mortgage deed dated 27.9.2006, with the PNB, whereas opening capital contribution of the non-claimant was Rs. 2,00,152.97 and that of claimant was Rs.10,00,000/-. It has also come in Ext. C-1 that in case Mr. Jasvinder Singh Narula failed to contribute his total capital of



Rs.10 lac by 31st August 1993, percentage of his share would change proportionately, irrespective of existence of any other document/agreement. The claimant has invested Rs.10 lac. The profits and losses were to be determined on the basis of his capital investment of Rs.10 lac vis-a-vis Rs.2,00,000/- by the non-claimant.

22. Mr. J.S. Bhogal, learned Senior Advocate, appearing on behalf of the non-claimant has argued that all the documents along with contents were to be read in conjunction with evidence of the non-claimant.

23. In the instant case, learned Arbitrator has not gone beyond the recital of the partnership deed. It was stated in the partnership deed and in all the subsequent partnership deeds, earlier terms and conditions would remain the same. The basic document entered into between the parties was MOU in the month of May 1992. The building assets were never transferred to the partnership firm, rather the lease deed was executed by Jai Mal Singh, father of the non-claimant on 23.8.1993. Since the property, i.e. land building has never become the partnership property, the share of the non-claimant was not to the extent of 75%. The capital share ratio was to be determined on the basis of the investment made including the profit/loss share. Thereafter, the partnership deed was entered into between the parties on 1.12.1992 and supplementary partnership agreement was entered into between the parties on 14.12.1992.



24. Learned Arbitrator has also appointed Mr. S.C. Paul as receiver. The reports submitted by Mr. S.C. Paul have been discussed by the learned Arbitrator in para 86 of the impugned Award. According to the report of the receiver, non-claimant had withdrawn unilaterally an amount to the tune of Rs.72 lac from the firm since 2005 till March 2008 vide report dated 21.12.2007. Learned Arbitrator has appointed Mr. Dinesh Mittal, C.A. with consent of the parties to look into the accounts and records of the firm since 1.4.2005. He has also discussed the report submitted by Mr. Dinesh Mittal, C.A. in paras 88 and 89 of the Award. According to the report submitted by Mr. Dinesh Mittal, C.A., there had been large scale violation in maintenance of the accounts and records.

25. Mr. J.S. Bhogal, learned Senior Advocate, has also argued that the claim filed by the claimant was barred by limitation.

26. In the present case, the parties have entered into an MOU in the year 1992. Thereafter, various partnership deeds have been executed. The last deed was executed on 10.7.2003. The correspondence was changed between the parties. According to the claimant, profits were as per the investment made by them. The non-claimant has issued notice to the claimant on 27.12.2004 informing the claimant about the dissolution of partnership firm w.e.f. 31.3.2005. Thereafter, the claimant has approached this Court and ultimately, the Arbitrator was appointed by this Court on 18.8.2005 in Arbitration Appeals No. 1 of 2005 and 2 of 2005. The learned



Arbitrator has come to the right conclusion that the claim filed by the claimant was within limitation. The issue of goodwill has also been rightly answered by the learned Arbitrator after taking into consideration the entire evidence.

27. In ***Shyama Charan Agarwala and sons vs. Union of India***, (2002) 6 SCC 201, their Lordships of Hon'ble Supreme Court have held that the aim of arbitration is to settle all disputes between the parties and to avoid further litigation. Their Lordships have held as under:

"21. In our view the view taken by the High Court cannot be sustained. It is clear from the arbitration clause viz. clause 70 that all disputes between the parties to the contract (other than excepted matters) can be referred to arbitration. The Contractor did make a claim in respect of future period also. The document appointing the arbitrator would show that the arbitrator was required to decide the disputes arising between the parties. It is not possible to hold that Claim 1 insofar as it relates to future period during which the contract work continued is beyond the scope of reference or outside the ambit of arbitration clause. The aim of arbitration is to settle all the disputes between the parties and to avoid further litigation. There is no legal justification in restricting the scope of arbitration in the manner in which the High Court did. In the list if a dispute which is annexed to the letter of appointment of the arbitrator, it is mentioned without any qualification or restriction as follows:

"Reimbursement of additional cost in procurement of stone aggregate from crusher of Belgaum, Hubli etc. in lieu of local sources of Goa."

28. In ***McDermott International Inc. vs. Burn Standard Co. Ltd. and ors.*** (2006) 11 SCC 181 have held that the 1996 Act makes provision for the supervisory role of courts and for the review of the arbitral award only to ensure fairness.



Intervention of the Court is envisaged only in few circumstances like, in case of fraud or bias by the arbitrators, violation of natural justice etc.. The court cannot correct errors of the arbitrators. Their Lordships have further held that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interest of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. Their Lordships have held as under:

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

58. In *Renusagar Power Co. Ltd. v. General Electric Co.* [(1994) Supp 1 SCC 644], this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian Law, (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression 'public policy' was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (for short '*ONGC*') [(2003) 5 SCC 705]. This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156] wherein the applicability of the expression 'public policy' on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/ or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the



Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC (supra)*, this Court, apart from the three grounds stated in *Renusagar (supra)*, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merit of the matter.”

29. In *Markfed Vanaspati & Allied Industries vs. Union of India*, (2007) 7 SCC 679 their Lordships of Hon’ble Supreme Court have held that the arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The Arbitrator is neither more nor less than a private judge of a private court (called an Arbitral Tribunal) who gives a private judgment (called an award).

30. In *Delhi Development Authority vs. R.S. Sharma and Company, New Delhi*, (2008) 13 SCC 80 their Lordships of Hon’ble Supreme Court have laid down following procedure for interference with the arbitration award under Section 34 of the Act as under:-

“21. From the above decisions, the following principles emerge:

(a) An Award, which is (i) contrary to substantive provisions of law ; or (ii) the provisions of the Arbitration and Conciliation Act, 1996 ; or (iii) against the terms of the respective contract ; or (iv) patently illegal, or (iv) prejudicial to the rights of



the parties, is open to interference by the Court under Section 34(2) of the Act.

(b) Award could be set aside if it is contrary to :

(a) fundamental policy of Indian Law; or (b) the interest of India; or (c) justice or morality;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the Arbitrator as well as the Division Bench of the High Court were justified in granting the Award in respect of Claim Nos. 1-3 and additional Claim Nos. 1-3 of the claimant or the appellant-DDA has made out a case for setting aside the Award in respect of those claims with reference to the terms of the Agreement duly executed by both parties.”

31. In *J.G. Engineers Private Ltd. vs. Union of India and anr.*, (2011) 5 SCC 758 their Lordships of Hon’ble Supreme Court have summarized the principles for setting aside the award by the Court under Section 34 (2)(b)(ii) as under:

“27. Interpreting the said provisions, this court in *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* [2003 (5) SCC 705] held that a court can set aside an award under section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set



aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

32. Mr. J.S. Bhogal, learned Senior Advocate has relied upon *Surana Telecom Limited vs. Bharat Sanchar Nigam Limited*, 2008(3) R.A.J. 486 (Del). According to the learned Single Judge it is within the scope of an Arbitrator to interpret the terms and conditions of the contract as they exist on the record and govern the parties however, he cannot re-write the contract for either of the parties. Learned Single Judge has held as under:-

“7. I have heard learned counsels for the parties and have also perused the relevant documents referred to by the parties. There is substance in the submission of the learned counsel for the respondent that for a matter to be referred to arbitration, prima facie, a dispute ought to exist which can be referred for adjudication. In the present case, as is apparent from a perusal of the letter dated 7.4.2007 addressed by the petitioner to the Director (Operation) of the respondent, the petitioner has sought for modification of certain terms and conditions of the Annual Maintenance Contract which forms part of the work order awarded to the petitioner. The petitioner having entered into the contract with the respondent with open eyes, any modification and /or variation of the clauses governing the parties cannot be termed as “dispute/difference” for being referred to arbitration. While it is within the scope of an Arbitrator to interpret the terms and conditions of the contract as they exist on the record and govern the parties however, he cannot re-write the contract for either of the parties.”

33. Mr. J.S. Bhogal, learned Senior Advocate has further relied upon **National Thermal Power Corporation Limited (NPTC) vs. Gammon India Limited**, 2008 (4) R.A.J.



595 (Del). According to para 21 of this judgment, the Arbitrator is bound by contract between the parties and he cannot re-write the contract and award claims and he can interpret the contract and arrive at a conclusion about meaning of a particular clause. Learned Single Judge held as under:-

“In addition to this as per clause No.8.0.0 of Technical Specification Section c(o), the respondent/GIL was to carry out soil investigation itself. It was specified that information like soil characteristics given by the petitioner/NTPC in the tender were only indicative for guidance. Bidder was to fully satisfy himself about the nature of soil strata, its bearing capacity and other characteristics to be encountered at the site of cooling tower prior to submission of the bid. It was specifically stated by the petitioner that owner (NTPC) does not take any responsibility for actual soil data or for variation between the actual soil data and the indicative data. In view of this specific provisions in the contract and in view of the fact that the tenders were invited on 3rd October, 1986 and tenders were to be submitted in December 1986 and there was a gap of more than 21/2 months between invitation and submission of the bids, there was sufficient time with every tenderer to do the soil investigation, find out the data and then submit his bid. Despite this specific provision in the contract, the observation of the Tribunal regarding soil condition and that the delay was due to inaccurate soil data supplied by the petitioner is contrary to the contract and does not stand the scrutiny of law. It was not the obligation of the petitioner to give a data to the claimant/respondent in respect of sub soil, water conditions or about soil pressure to be encountered. The tenderer who was to give bid, was at liberty to conduct sub soil testing before giving bid. The bid was being given for a work, which ran into several crores of rupees and every tenderer knew that the work involved below ground construction and sub soil structure for which proper soil testing and knowing the nature of soil was necessary. If the tenderer gives bid despite warning in the tender documents, without doing the actual soil testing only



relying on the indicative data, no blame can be put on the owner (petitioner) and no compensation could be awarded on this ground. It is settled law that the Arbitrator is bound by the contract between the parties. The Arbitral Tribunal cannot re-write the contract and award claims. It can interpret the contract and arrive at a conclusion about meaning of a particular clause. Such an interpretation would be binding on the parties and Courts would not find faults with interpretation unless it shocks the conscience of the Court. But the Arbitral Tribunal cannot altogether ignore the terms of contract governing relationship of parties and make an award contrary to the contract. In this case the Arbitral Tribunal at the very outset came to the conclusion that delay in completion of work by GIL was due to inadequate supply of soil data by NTPC. These observations are contrary to express terms of the contract. The Tribunal has not even bothered to look into those terms and conditions of contract which deal with this aspect what to talk of interpreting the contract. The award of amount against claim no.1 is liable to be set aside on the ground of being contrary to contract itself.”

34. These judgments are distinguishable from this case. Learned Arbitrator has not re-written the terms and conditions of the contract. He has adjudicated upon the disputes raised before him as per the arbitration clause, which were very comprehensive.

35. Mr. Ajay Mohan Goel, learned Advocate, has placed reliance on judgment rendered by learned Single Judge of Bombay High Court in Arbitration Application No.244 of 2012, **Jayesh M. Gandhi and ors. Vs. Yogendra N. Thakur**, decided on 9.4.2013. Learned Single Judge has held that whether profit and loss ratio of the partners remain the same that was recorded in the said partnership deed or was revised and if so, at what rate and distribution of the profit and withdrawal of the capital



account, disbursement of expenses etc. would be a dispute in connection with the partnership or the said partnership deed which can be referred to arbitration in terms of the said clause and the learned Single Judge has also not accepted the submission made by the respondent that the Memorandum of Understanding and the consent terms entered into between the parties after execution of the partnership deed dated 24th April 2000 shall be read in isolation or that the said two documents signed by the parties were in substitution of the partnership deed. Learned Single Judge has held as under:

“40. On perusal of the arbitration clause recorded in clause 18 of the partnership deed, it is clear that the said clause is very wide and mandates that all dispute and question in connection with the partnership or the said deed arising between the partners and their representatives shall be referred to arbitration. In my view, the question as to whether profit and loss ratio of the partners remain the same that was recorded in the said partnership deed or was revised and if so, at what rate and distribution of the profit and withdrawal of the capital account, disbursement of expenses etc. would be a dispute in connection with the partnership or the said partnership deed which can be referred to arbitration in terms of the said clause. I am also not inclined to accept the submission made by the respondent that the Memorandum of Understanding and the consent terms entered into between the parties after execution of the partnership deed dated 24th April 2000 shall be read in isolation or that the said two documents signed by the parties were in substitution of the partnership deed.”

36. The award dated 16.2.2009 passed by the learned Arbitrator is in conformity with law and does not suffer from any illegality.



2013:HHC:9458

26

37. In view of above discussions and analysis, there is no merit in the petition and same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

(Rajiv Sharma)
Judge

24.9.2013
(*pankaj*)